

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2005-57-C - ORDER NO. 2005-387
JULY 20, 2005

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|--------|--|---|------------------|
| IN RE: | Joint Petition for Arbitration of NewSouth |) | ORDER GRANTING |
| | Communications Corporation, NuVox |) | MOTION TO STRIKE |
| | Communications, Incorporated, KMC |) | TESTIMONY |
| | Telecom V, Incorporated, KMC Telecom III |) | |
| | LLC, and Xspedius [Affiliates] of an |) | |
| | Interconnection Agreement with BellSouth |) | |
| | Telecommunications, Inc. Pursuant to Section |) | |
| | 252(b) of the Communications Act of 1934, |) | |
| | as Amended |) | |

This matter comes before the Commission on BellSouth Telecommunications Inc. (“BellSouth”)’s motion to strike the testimony of Hamilton Russell, III, filed June 14, 2005. BellSouth is represented by Patrick W. Turner, Esquire; NewSouth Communications (“NewSouth”) and Xspedius Affiliates (“Xspedius”), collectively referred to as “the Joint Petitioners”, are represented by John J. Pringle, Esquire. On June 21, 2005, the Commission designated me as a hearing officer in this matter. In this capacity, I have reviewed briefs and heard oral arguments from the parties on June 29, 2005. For the reasons stated herein, BellSouth’s motion is granted.

Background

Hamilton Russell testified in these proceedings as a witness called by the Joint Petitioners. Russell is an attorney licensed to practice in South Carolina. He is a former

Vice President of NuVox Communications, Inc., one of the joint petitioners in these proceedings, and he is currently employed by the law firm of Nelson Mullins Riley & Scarborough, LLP (“Nelson Mullins”). Nelson Mullins represented BellSouth in various matters in South Carolina during the pendency of these proceedings. BellSouth’s Memorandum in Reply to Joint Petitioners’ Response to BellSouth’s Motion to Strike, at p. 11, and Exhibit C (setting forth various appearances by Nelson Mullins on behalf of BellSouth).

The sequence of events giving rise to this controversy is set out below.

On May 11, 2005, Russell submitted prefiled direct testimony on behalf of the Joint Petitioners. Russell identified himself as the Vice President, Regulatory and Legal Affairs of NuVox. In his direct testimony Russell stated: “The purpose of my testimony is to offer support for the Joint Petitioners’ Position, as set forth with respect to each unresolved issue subsequently herein, and associated contract language on the issues indicated in the chart above.” Direct Testimony of the Joint Petitioners, p. 10.

On May 18, 2005, Russell accepted a position with Nelson Mullins.

On May 23, 2005, Russell gave rebuttal testimony in this case. He again identified himself as the Vice President, Regulatory and Legal Affairs for NuVox. Rebuttal Testimony of the Joint Petitioners, p. 5. He stated “The purpose of my testimony is to offer support fro the CLEC Position, as set forth herein, and associated contract language issues indicated in the chart above by rebutting testimony provided by the various BellSouth witnesses.” Rebuttal Testimony of the Joint Petitioners, p. 6. He did not mention that he had accepted a position with Nelson Mullins.

On June 1, 2005, Russell testified before the Commission in the hearing held in this matter. He introduced his testimony as follows: “Good morning, Mr. Chairman and Commissioners. I’m here on behalf of NuVox Communications. We’re headquartered in Greenville, South Carolina. We’ve been operating here since we received Commission approval in 1998. We have 750 employees here in South Carolina. We’re invested in \$21 million in this state, have 60,000 access lines here.” Hearing Tran., pp. 15-16. On the same date, the Joint Petitioners also filed an Errata Sheet, correcting certain aspects of Russell’s direct testimony. Mr.

Russell did not mention his relationship with Nelson Mullins in the hearing or in his errata sheet.

On June 6, 2005, Russell resigned his position with NuVox as Vice President, Legal and Regulatory Affairs.

On June 14, 2005, counsel for NuVox wrote counsel for BellSouth to inform him of Russell's resignation, and of his employment with Nelson Mullins. Counsel for NuVox also stated that "As of the date of the hearing in this Docket, Mr. Russell had performed work on behalf of certain clients of Nelson Mullins. However, Mr. Russell was also working on certain projects for NuVox during that time in order to complete those projects on or before June 6, 2005, and remained VicePresident of Legal Affairs for NuVox through that date." Letter from John J. Pringle to Patrick W. Turner, June 14, 2005. Counsel for NuVox also represented that "Mr. Russell has never performed any work on behalf of BellSouth Telecommunications, Inc. or any of its parent companies, affiliates, or subsidiaries." *Id.* BellSouth filed its Motion to Strike Russell's testimony on the same day.

Discussion

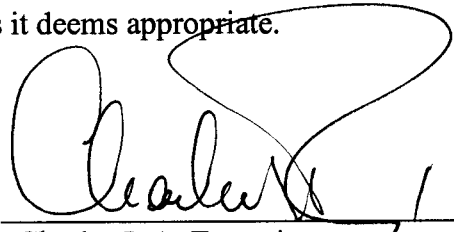
First, BellSouth argues that Russell's Rebuttal and Hearing testimony was incomplete and inaccurate. The Joint Petitioners contend that Russell's testimony was accurate in so far as the purpose of the hearing was concerned. Second, BellSouth argues that, although called as a witness, Russell functioned as an advocate for the Joint Petitioners at the hearing, and therefore had a conflict of interest. BellSouth asserts that, had it known of Russell's employment at the time of the hearing, it would have objected to his testimony and asserted a conflict of interest to prevent him from testifying on behalf of the Joint Petitioners (at least as to matters of law). The Joint Petitioners argue that Russell only appeared as a witness in these proceedings, and because he did not appear as a lawyer, he did not have a conflict of interest that would have prevented him from testifying. The Commission only needs to rule on BellSouth's first argument to grant relief in this matter.

Russell's rebuttal testimony and hearing testimony was incomplete. It is not clear from the record whether Mr. Russell was working for Nelson Mullins's clients on May 23, 2005, when he presented his rebuttal testimony, or whether he had merely accepted an offer of future employment at that time. His failure to reveal that he had accepted a position with Nelson Mullins prevented inquiry on this subject. Russell's testimony at the June 1, 2005, hearing was also incomplete. At the time, Russell had accepted a position with Nelson Mullins and, according to the Joint Petitioners' attorney, he had "performed work on behalf of certain clients of Nelson Mullins". Letter from John J. Pringle, *supra*. Russell's failure to mention his relationship with Nelson Mullins at the time of the hearing is a material omission from his testimony, which prevented BellSouth from raising objections regarding his testimony.

In oral argument, both parties agree that their witnesses presented a mixture of facts and legal opinion in their testimony. Ordinarily, testimony on the law is subject to objection. Shields v. S.C. Dept. of Highways, 303 S.C. 439, 447, 401 S.E.2d 185 (1991). However, such testimony was repeatedly presented by the parties to these proceedings without objection. BellSouth argues that it would have objected to Mr. Russell's testimony, had it known that he was employed by its law firm, Nelson Mullins. Because BellSouth did not know that Russell was employed by Nelson Mullins it did not raise these objections, and the Commission never had the opportunity to hear the argument in the context of the hearing. Now, with the proverbial horse out of the barn, it is not feasible to dissect Mr. Russell's testimony in light of BellSouth's newly asserted objections.

Questions concerning the admission of evidence are within the discretion of the trial court. Bensch v. Davidson, 354 S.C. 173, 580 S.E.2d 128 (2003); Kirkland v Peoples Gas Co. 269 S.C 431, 237 S.E.2d 772 (1977). The interests of justice require that Russell's rebuttal and hearing testimony be stricken from the record because BellSouth was deprived of the full opportunity to raise objections and otherwise contest this testimony. However, there is no evidence that Russell's omission was willful. Therefore, the Joint Petitioners will be allowed to replace the stricken testimony in order to bring these proceedings to a conclusion. Therefore, the proceedings will be reopened and the Joint Petitioners shall be given fifteen (15) days from the date of this order to prefile testimony and exhibits by witnesses of their choice (including Russell, if they so desire) for the limited purpose of testifying as to those matters addressed in Russell's rebuttal testimony. BellSouth may also file surrebuttal testimony and raise any objections that it feels are necessary to this testimony in light of its newly acquired knowledge regarding Russell's acceptance of employment with Nelson Mullins. After the parties have completed this process, they may request that the Commission reopen the hearing to receive new testimony on the issues previously addressed by Russell, if they so desire. During the course of such testimony, BellSouth will be given the opportunity to raise objections and engage in such cross examination as it deems appropriate.

IT IS SO ORDERED.


Charles L.A. Terreni
Hearing Officer

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